

REMARKS

This Response is submitted in reply to the Non-Final Office Action mailed on July 21, 2009. No fees are due herewith this Response. The Commissioner is hereby authorized to charge any fees that may be required or credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 3714652-00504 on the account statement.

Claims 1, 3 and 5-14 are pending in the application. Claims 2 and 4 were previously canceled. In the Office Action, Claims 1, 3 and 5-14 are rejected under 35 U.S.C. §112; Claims 1, 5-7 and 9 are rejected under 35 U.S.C. §102(b); and Claims 1, 3 and 5-14 are rejected under 35 U.S.C. §103(a). In response, Claims 1 and 11 are amended. The amendments do not add new matter and are supported in Applicants' specification at page 10, line 33-page 11, line 25. In view of the amendments and for at least the reasons provided below, Applicants respectfully request that the rejections be withdrawn.

In the Office Action, Claims 11-12 are rejected under 35 U.S.C. §112, first paragraph, as failing to comply with the written description requirement. Specifically, the Office Action asserts that the Applicants' specification does not support the previous amendment to Claim 11, particularly the steps of mixing microorganisms and inert carbohydrate followed by drying and adding further components. See, Office Action, page 2, line 16-page 3, line 6. Applicants respectfully disagree and submit that the specification provides support for the above claim language.

For example, Applicants' specification states that the present invention provides a process for obtaining a pellet, which comprises mixing a preparation of "microorganisms" and "further components", drying the mixture to an Aw below 0.3, compacting the mixture under pressure to obtain pellets comprising a volume of at least 0.02 cm³, and coating the pellets with a moisture barrier. See, specification, page 4, line 35 to page 5, line 3. The specification also states that the "microorganisms" are preferably in the form of particles, that the particles preferably comprise inert carbohydrates and that suitable particles are obtained by mixing the microorganisms and inert carbohydrates. See, specification, page 11, lines 14-33. Therefore, the specification establishes that particles containing "microorganisms" can include inert carbohydrates and can be dried. The specification also establishes that the "microorganisms,"

preferably in the form of dried particles, can be mixed with "further components" and dried to the water activity and volume required in Claim 11.

Further, the specification clearly states that, in an embodiment wherein the microorganisms are in a dried form, "microorganisms are mixed with a carrier material such as a carbohydrate . . . during or before the drying." See, specification, page 11, lines 3-6; see also page 11, lines 19-25. If the microorganisms are mixed with a carbohydrate before drying, it must follow that the microorganism is mixed with a carbohydrate to form a mixture and then that mixture is dried to form particles. This would be readily apparent to the skilled artisan. Accordingly, this provides support, in part, for the portion of Claim 11 that recites "the steps of mixing a first preparation of micro-organisms and 40% to 70%, by weight of total dry matter, of at least one carbohydrate selected from the group consisting of maltodextrins, starches, low molecular weight sugars, hydrocolloids and combinations thereof, wherein the micro-organisms are embedded in the at least one carbohydrate, drying the first preparation to form particles."

The specification further provides at least six paragraphs in the specification that discuss the multitude of variations in steps of preparation of the presently claimed pellets. For example, the specification at page 17, line 10-page 18, line 5, explicitly states that the principle steps of preparation including, for example, mixing, drying, compacting and coating, "may be varied in a way that corresponds to common sense" and that "'mixing' and 'drying', may be subdivided, for example 'mixing only few of the ingredients, drying them, adding other ingredients to the mixture, compacting, drying again and coating'."

The specification also clearly states that the particles are obtained by "mixing the micro-organisms with the inert carbohydrates" and drying the mixture. See, specification, page 11, lines 31-35. Although this portion of the specification recites modes of drying as spray drying and fluidized-bed drying, the specification also states that "[p]ossible drying devices comprise convection ovens, belt dryers, vacuum dryers, fluidized bed dryers, rotary dryers, just to mention a few." See, specification, page 17, lines 34-36. Accordingly, Applicants submit that, in contrast to the Patent Office's assertion, "drying" is supported by the specification.

Once the particles have been obtained, the specification clearly describes how the particles may be combined with further components of the matrix, dried, compacted and coated. See, specification, Abstract; page 3, line 35-page 4, line 3; page 9, lines 1-10; page 12, lines 10-

14; page 17, line 10-page 18, line 5. As such, this provides support, in part, for the portion of Claim 11 that recites "mixing the particles and further components to form a second preparation, drying the second preparation to an Aw below 0.3, compacting the second preparation under pressure to obtain pellets comprising a volume of at least 0.02 cm³, and coating the pellets with a moisture barrier." Accordingly, Applicants respectfully disagree with the Patent Office's assertion that Claims 11-12 fail to comply with the written description requirement. In contrast, Applicants respectfully submit that the skilled artisan would immediately appreciate that Claims 11-12 are fully supported by the specification.

Based on at least these noted reasons, Applicants believe that Claims 11-12 fully comply with 35 U.S.C. §112, first paragraph. Accordingly, Applicants respectfully request that the rejection of Claims 11-12 under 35 U.S.C. §112, first paragraph be reconsidered and withdrawn.

In the Office Action, Claims 1, 3 and 5-14 are rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. Specifically, the Office Action asserts that the phrase "inert carbohydrate" makes the claim indefinite because it is unclear what is meant by "inert" carbohydrate. See, Office Action, page 3, lines 10-17. In response, Applicants have amended independent Claims 1 and 11 to recite, in part, at least one carbohydrate selected from the group consisting of maltodextrins, starches, low molecular weight sugars, hydrocolloids and combinations thereof. The amendment is supported in Applicants' specification at page 11, lines 19-25. In view of this amendment to Claims 1 and 11, Applicants respectfully submit that the rejections of Claims 1, 3 and 5-14 under 35 U.S.C. §112, second paragraph are now rendered moot.

Accordingly, Applicants respectfully request that the rejections of Claims 1, 3 and 5-14 under 35 U.S.C. §112, second paragraph be reconsidered and withdrawn.

In the Office Action, Claims 1, 5-7 and 9 are rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 5,480,641 to Casas-Perez ("*Casas*"). Independent Claim 1 recites, in part, a pellet comprising a compacted inner matrix and at least one coating, wherein the inner matrix comprises particles comprising at least one inert carbohydrate embedded with 10⁵ to 10⁸ viable micro-organisms per gram of pellet, wherein the inner matrix contains 40% to 70%, by weight of total dry matter, of the at least one inert carbohydrate, and the coating

comprises a moisture barrier. Applicants submit that *Casas* fails to disclose or suggest each and every element of Claims 1, 5-7 and 9.

For example, *Casas* fails to disclose or suggest a pellet comprising a compacted inner matrix and at least one coating wherein the inner matrix contains 40% to 70%, by weight of total dry matter, of at least one inert carbohydrate as required, in part, by independent Claim 1. In fact, *Casas* fails to disclose any dry weight percentages of its whey in its compressed pellet. At best, *Casas* suggests 100% dry weight of whey in a pellet of the first embodiment where no other components are present in the pellet. The second embodiment, on the other hand, includes *L. reuteri* cells suspended in oil and mixed with whey. However, *Casas* fails to teach or suggest any dry weight percentages of the whey in that embodiment as well. Therefore, *Casas* is deficient with respect to independent Claim 1.

Casas also fails to disclose or suggest a pellet comprising a compacted inner matrix and at least one coating, wherein the inner matrix comprises particles comprising at least one inert carbohydrate and viable micro-organisms, and the coating comprises a moisture barrier as required, in part, by independent Claim 1. Simply put, independent Claim 1 requires: (a) an inner matrix with microorganisms and an inert carbohydrate, and (b) that the inner matrix has a coating. In contrast to Examiner's assertions, *Casas* fails to teach this above combination of elements. *Casas* teaches two embodiments. The first includes pelletized whey particles, not mixed with any microorganisms, coated by microorganisms suspended in oil. This embodiment is deficient because it does not teach an inner matrix having both microorganisms and inert carbohydrates. The second embodiment includes a microorganism-oil suspension mixed with whey, with that mixture compressed into pellets with no coating. This embodiment is deficient because it does not teach a coating. The table below makes very clear the deficiencies in both embodiments of *Casas*.

Independent Claim 1	Embodiment 1 of <i>Casas</i>	Embodiment 2 of <i>Casas</i>
Inner Matrix comprising: a) microorganisms AND b) inert carbohydrates	NO – includes whey only	YES – includes microorganisms-in-oil suspension mixed with whey
Coating	YES – includes microorganisms suspended in oil	NO – no coating

Applicants submit that the Patent Office is incorrectly combining embodiments of a prior art reference to arrive at the present claims. “[T]he prior art reference--in order to anticipate under 35 U.S.C. § 102--must not only disclose all elements of the claim within the four corners of the document, but must also disclose those elements ‘arranged as in the claim.’” *Net Moneyin, Inc. v. Verisign, Inc.*, 545 F.3d 1359, 1369 (Fed. Cir. 2008); *Finisar Corp. v. DirecTV Group, Inc.*, 523 F.3d 1323, 1334 (Fed. Cir. 2008). The “arranged as in the claim” language requires an anticipatory reference “to show all of the limitations of the claims arranged or combined in the same way as recited in the claims.” *Net Moneyin*, 545 F.3d at 1370 (emphasis added). The Federal Circuit has similarly held that it is improper to pick and choose various elements that are not directly related to each other by the teachings of the reference. *Sanofi-Synthelabo v. Apotex, Inc.*, 550 F.3d 1075, 1083 (Fed. Cir. 2008). Instead, elements from different embodiments of a single reference can be combined for anticipation purposes only if the reference teaches or suggests such combination to one of skill in the art. *Applera Corp. v. Micromass UK Ltd.*, 204 F. Supp. 2d 724, 752 (D. Del. 2002).

The two embodiments of *Casas* both teach the three specific components of whey, microorganisms and oil. To read on the present claims, the core of the second embodiment is necessary as it teaches a combination of microorganisms and whey (carbohydrate) required by the claims. However, the second embodiment uses no coating because every component, including oil, is already contained in the pellet core. The first embodiment, on the other hand, teaches a coating of microorganisms and oil, but contains such coating only because the pellet core solely contains whey. Therefore, there is no reason or suggestion to combine the pellet core of the second embodiment with the coating of the first embodiment because the core of the second embodiment already contains the microorganism-oil suspension. Moreover, the

Examiner cites no support in *Casas* for combining the various elements from different embodiments. As such, Appellants respectfully submit that the combination of elements from different embodiments is insufficient to anticipate the present claims.

Accordingly, because *Casas* fails to disclose or suggest every element of independent Claim 1, Applicants respectfully request that the anticipation rejection of Claims 1, 5-7 and 9 be reconsidered and withdrawn.

In the Office Action, Claims 1, 3 and 5-14 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,888,171 to Okonogi, et al. ("*Okonogi*") in view of EP 0 298 605 to Klapwijk, et al. ("*Klapwijk*") and WO 99/48372 to Van Lengerich ("*Van Lengerich*"). Applicants submit that the cited references, alone or in combination, fail to disclose or suggest every element of the present claims.

Okonogi, *Klapwijk* and *Van Lengerich* fail to disclose or suggest a pellet comprising an inner matrix comprising at least one carbohydrate embedded with 10^5 to 10^8 viable microorganisms per gram of pellet as required, in part, by independent Claim 1. *Okonogi*, *Klapwijk* and *Van Lengerich* also fail to disclose or suggest a process for obtaining pellets comprising mixing a first preparation of micro-organisms and at least one carbohydrate, wherein the microorganisms are embedded in the at least one carbohydrate as required, in part, by independent Claim 11. Instead, *Okonogi* teaches a granular product consisting of a core material and an adherent material containing dried microorganism cells and binding material for coating said core material with said adherent material (including microorganisms) in a stratified structure. See, *Okonogi*, column 3, lines 1-5. Therefore, rather than teaching carbohydrates embedded with microorganisms, *Okonogi* teaches coating a core with adherent microorganism material.

Applicants submit that secondary references *Klapwijk* and *Van Lengerich* fail to remedy the above deficiencies in *Okonogi*. *Klapwijk*, for example, is entirely directed toward aqueous suspensions of viable microflora that have improved ambient stability and is usable in fermentation. See, *Klapwijk*, Abstract. In fact, *Klapwijk* fails to even teach or disclose a pellet composition or process for obtaining a pellet. Instead, the composition of *Klapwijk*, consisting of a microorganism slurry and flour, is combined and packaged as a finished product for use generally in bread making. See, *Klapwijk*, page 3, lines 22-25; Examples 1 and 2. *Van Lengerich* is entirely directed toward products having encapsulated organisms. See, *Van*

Lengerich, Abstract. Specifically, the invention of *Van Lengerich* provides a product with an encapsulated microorganism in a pleasantly tasting and chewable surrounding matrix. As such, *Van Lengerich* clearly fails to teach or suggest carbohydrates embedded with microorganisms. Instead, *Van Lengerich* teaches the surrounding of encapsulated microorganisms. Therefore, Applicants respectfully submit that *Okonogi*, *Klapwijk* and *Van Lengerich* fail to disclose or suggest every element of the present claims.

Also in the Office Action, Claims 11-12 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Casas*. Independent Claim 11 recites, in part, a process comprising the steps of mixing a first preparation of micro-organisms and 40% to 70%, by weight of total dry matter, of at least one carbohydrate, wherein the micro-organisms are embedded in the at least one carbohydrate, drying the first preparation to form particles, mixing the particles and further components to form a second preparation, drying the second preparation, compacting the second preparation under pressure to obtain pellets, and coating the pellets with a moisture barrier. Applicants respectfully submit that *Casas* fails to disclose or suggest each and every element of Claims 11-12.

For at least the reasons set forth above, both embodiments of *Casas* fail to disclose forming a particle of microorganisms embedded in a carbohydrate, mixing the particles with further components to form a second preparation, compacting the second preparation to obtain pellets and coating the pellets with a moisture barrier.

Further, *Casas* fails to disclose or suggest mixing a preparation of micro-organisms and 40% to 70%, by weight of total dry matter, of at least one carbohydrate as required, in part, by independent Claim 11. In fact, *Casas* fails to disclose any dry weight percentages of its whey in its compressed pellet. At best, *Casas* suggests 100% dry weight of whey in a pellet of the first embodiment where no other components are present in the pellet. The second embodiment, on the other hand, includes *L. reuteri* cells suspended in oil mixed with whey. However, *Casas* fails to teach or suggest any dry weight percentages of the whey in that embodiment. Therefore, *Casas* is deficient with respect to independent Claim 11.

In contrast to the Patent Office's assertion that Applicants have argued against the references individually, Applicants respectfully disagree. See, Office Action, page 12, lines 7-10. Instead, Applicants respectfully submit that, to the extent that the references are discussed

individually, it is not to address the rejections as anticipation rejections, but rather to point out the deficiencies of the cited references. In this case, the cited references also fail to disclose each and every element of the present claims.

Accordingly, because the cited references fail to disclose or suggest each and every element of independent Claims 1 and 11, Applicants respectfully request that the obviousness rejections of Claims 1, 3 and 5-14 be withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same. In the event there remains any impediment to allowance of the claims that could be clarified in a telephonic interview, the Examiner is respectfully requested to initiate such an interview with the undersigned.

Respectfully submitted,

K&L GATES LLP

BY 

Robert M. Barrett

Reg. No. 30,142

Customer No. 29157

Phone No. 312-807-4204

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